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Supreme Court of the United States.

October Term, 1941.

No. 637.

Charles D. Rice et al., Trustees,
Petitioners,

v.

Abraham S. Guterman, Trustee in Bankruptcy,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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INDEX.

	Page
Statement of the case	1
Controlling statutes	2
Issue	3
Summary of argument	4
Argument	6
I. The mortgage is invalid against the trustee for failure to record in Boston	6
II. The authorities relied upon by the petitioners do not apply and are distinguishable	12
Conclusion	13

TABLE OF AUTHORITIES CITED.

A. & B. Oil Co., Matter of, 95 F. (2d) 946	9, 11
Alexander v. F. L. Smithe Machine Co., 248 Mass. 436	4n., 6
Commissioner of Public Works v. Cities Service Oil Co., 308 Mass. 349	8
Connecticut &c. R.R. Co. v. Cooper, 30 Vt. 476	7
Connecticut Valley Onion Co. v. Pielock, 281 Mass. 287	4n.
Detroit Transportation Co. v. Detroit, 91 Mich. 382	10, 12
Duffy v. Charak, 236 U.S. 97	2n.
Emerson v. Proctor, 97 Me. 460	8
Fairbanks Steam Shovel Co. v. Wills, 240 U.S. 642	2, 5, 7, 8, 9, 10
Fairbanks Steam Shovel Co. v. Wills, 212 Fed. 688	2, 7, 8, 10
Federal Trust Co. v. Bristol County Street Railway Co., 218 Mass. 367	5, 7
First Bank Stock Corp. v. Minnesota, 301 U.S. 234	12
First National Bank et al. v. Wilcox, 72 Wash. 473	9
Harnden v. Smith, 305 Mass. 485	12

	Page
International Milling Co. v. Columbia Transportation Co., 292 U.S. 511	12
Marlborough v. Lynn, 275 Mass. 394	12
Parker v. Proprietors of Cemetery of Mt. Auburn, 217 Mass. 286	5, 13
Schollenberger, Ex Parte, 96 U.S. 369	12
Sweeney v. Keystone Driller Co., 122 Ohio St. 16	9
Travis v. Bishop, 13 Met. 304	4n.
Western Transportation Co. v. Scheu, 19 N.Y. 408	11
Woodsum Steamboat Co. v. Sunapee, 74 N.H. 495	12
Bankruptcy Act, sec. 70	2n.
Mass. G.L. (Ter. Ed.) c. 156, sec. 6	3
Mass. G.L. (Ter. Ed.) c. 156, sec. 6(c)	3, 6
Mass. G.L. (Ter. Ed.) c. 156, sec. 41	1, 3, 6
Mass. G.L. (Ter. Ed.) c. 156, sec. 43	2, 3
Mass. G.L. (Ter. Ed.) c. 255, sec. 1	2
Rules of the United States Supreme Court, Rule 38(5)	4, 13
Jones, The Law of Chattel Mortgages and Conditional Sales (6th Ed. Rev.), sec. 253	9

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No. 637.

CHARLES D. RICE ET AL., TRUSTEES, *Petitioners,*

v.

ABRAHAM S. GUTERMAN, TRUSTEE IN BANKRUPTCY, *Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Statement of the Case.

For an accurate statement of the case, this Court is referred to the opinion of the Circuit Court of Appeals rendered on June 23, 1941 (R. pp. 35-45).*

The petitioners' statement is substantially correct except that it fails to include the important fact—conceded from the very beginning (R. 9)—that the stockholders of the bankrupt corporation never voted to authorize a change of the location of the corporation's principal office or place of business, as required by section 41 of chapter 156 of the Massachusetts General Laws (Ter. Ed.), nor were any articles of

*This decision has been officially reported in 121 F. (2d) 251.

amendment filed setting forth that the location had been changed, as required by section 43 of this chapter (R. 7),* nor does the statement mention the referee's findings (which may have a bearing on the applicability of the *Fairbanks* case, relied upon by the respondent, and upon the attempts of the petitioners to distinguish that case) to the effect that "at all times, the record book of the corporation was kept in Boston, at the office of counsel for the corporation" (R. 7), and that "meetings of the stockholders and directors were held at various places, including Boston, Cambridge and Belmont and no meetings ever took place in Everett" (R. pp. 7-8).

Controlling Statutes.

Massachusetts General Laws (Ter. Ed.), chapter 255, section 1, which was in force when the original mortgage was recorded, reads as follows:

> "Mortgages of personal property shall, within fifteen days from the date written in the mortgage, be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the town where he then principally transacts his business. * * * The mortgage shall not be valid against a person other than the parties thereto until so recorded; * * *."†

***The pertinent provisions of these sections of the Massachusetts business corporation law, as well as of the chattel mortgage recording statute, are quoted further along in this brief.**

†The trustee in bankruptcy is not a party within the meaning of this section (*Duffy* v. *Charak*, 236 U.S. 97), and, admittedly, as successor to the rights of creditors under section 70 of the Bankruptcy Act, he may avoid the mortgage if the recording requirements have not been complied with.

The pertinent provisions of the Massachusetts Corporation Law, G.L. (Ter. Ed.) c. 156, are as follows:

Section 6.

"* * * The agreement of association shall state:

* * * * * * * * *

(c) The location of the principal office of the corporation in the commonwealth * * *."

Section 41.

"Every corporation may * * *, by the vote of a majority of all its stock, * * * authorize a change of the location of its principal office or place of business in this commonwealth * * *."

Section 43 provides that "articles of amendment" shall be filed with the Commissioner of Corporations within thirty days after the meeting and that no such amendment shall take effect until filed as aforesaid; but since it is agreed that no stockholder action was taken under section 41, section 43 has no application.

Issue.

As the Circuit Court of Appeals points out (R. 35), the only issue in this case is whether the chattel mortgage was properly recorded. This, in turn, raises the question of "what is the residence of a domestic corporation for purposes of the chattel mortgage recording act" (R. 37).*

***It cannot be successfully disputed that "if, according to law, the residence of the Rice Chocolate Company was in Boston at the time of the recording of this chattel mortgage, the mortgage must be invalid as between third parties for lack of proper re-**

The decision of this case turns upon a question of substantive—not procedural—law, the answer to which is to be found only in the applicable mortgage recording and corporation laws, exact compliance with which must be established if the petitioners are entitled to any consideration by this Court.

Summary of Argument.

The only reason that could possibly be advanced by the petitioners for the granting of their petition is that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

> Rule 38(5) of the Rules of the United States Supreme Court.

No other provision of this rule is applicable.

Notwithstanding the fervent protests of the petitioners to the contrary, it is nevertheless the fact, as stated by the Circuit Court of Appeals (R. 37), that—

> "the Supreme Judicial Court of Massachusetts has never had occasion to pass upon the meaning of the word 'resides' as used in the chattel mortgage recording act when applied to domestic corporations, nor to establish the effect of the Massachusetts corporation law in the circumstances here presented."

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cording" (R. 38), *Alexander* v. *F. L. Smithe Machine Co.*, 248 Mass. 436 (1924), nor is any exception made "with reference to those who have notice of an unrecorded mortgage as there is in case of an unrecorded deed of real property." *Connecticut Valley Onion Co.* v. *Pielock*, 281 Mass. 287, 290 (1932). This is a long-established rule. *Travis* v. *Bishop*, 13 Met. (54 Mass.) 304 (1847).

There are no "applicable local decisions" with which the instant decision can conflict; and no argument, however tenuous, such as that set forth on pages 5 to 11 of the petitioners' brief, can change that situation. The cases principally relied on by the petitioners as representative of the Massachusetts law on the subject—*Federal Trust Co.* v. *Bristol County Street Railway Co.*, 218 Mass. 367 (1914), and *Parker* v. *Proprietors of Cemetery of Mt. Auburn*, 217 Mass. 286 (1914)—are so effectively disposed of by the Circuit Court of Appeals (R. pp. 43-44) as to leave no room for discussion on that score.

Indeed, it is seriously to be doubted whether *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U.S. 642 (1916), which is the leading case on this subject and upon which the respondent principally relies, presents a situation or problem which would today be reviewed under a practice which makes the granting of a review on writ of certiorari a matter of sound judicial discretion. That case was one of the last of this kind which came up for review on appeal. The instant case presents no great or important question of law requiring the decision of this Court (especially in view of the strong line of authorities supporting the decision of the court below), nor is there anything in the conduct of the proceedings "to call for an exercise of this court's power of supervision."

The respondent contends that, for the purposes of recording chattel mortgages in Massachusetts, the "residence" of a domestic corporation is at the place of its principal office as designated in its agreement of association and articles of organization or amendments thereto duly voted, certified and filed; that because of the failure of the corporation to change the location of its principal office by formal amendment and subsequent recording of the same with the Secretary of State, its residence remained in Boston as it was originally

stated; and that the mortgage is invalid as against him because it was not recorded in Boston.

The respondent further contends that whether or not, as the petitioners claim, the Rice Chocolate Company resided in Everett for the purpose of taxation, automobile registration, service of process or dishonor of commercial paper, it did not reside in Everett within the meaning of the chattel mortgage recording act; and for this reason, as the Circuit Court of Appeals has so ably pointed out, the authorities relied upon by the petitioners are distinguishable and inapplicable.

Argument.

I.

The Mortgage is Invalid against the Trustee for Failure to Record in Boston.

Clearly, if recording *both* in Everett and in Boston was required, the mortgage was invalid.

> *Alexander* v. *F. L. Smithe Machine Co.*, 248 Mass. 436 (1924).

It can hardly be disputed that, whatever else might have been accomplished by the various things that were done after the bankrupt corporation moved to Everett, the "location of the principal office" of the corporation was never duly and formally changed from Boston to Everett, as a matter of Massachusetts corporation law.

> Massachusetts G.L. (Ter. Ed.) c. 156, secs. 6(*c*) and 41.

These provisions were enacted for the benefit of creditors—

> Opinion of Circuit Court of Appeals, R. 40, and cases cited—

and failure to comply with their requirements may be taken advantage of by a trustee in bankruptcy.

Fairbanks Steam Shovel Co. v. *Wills,* 240 U.S. 642, 648 (1916).

It is only when a corporation is not located by the terms of its charter that its residence can be regarded as being in the place where it keeps its principal office and does its corporate business.

Connecticut &c. R.R. Co. v. *Cooper,* 30 Vt. 476 (1858).

Fairbanks Steam Shovel Co. v. *Wills,* 212 Fed. 688, 692 (1914).

And that is the principal reason why the case of *Federal Trust Co.* v. *Bristol County Street Railway Co.,* 218 Mass. 367 (1914), so strongly relied upon by the petitioners in the courts below and before this Court (Petition, p. 9), is distinguishable.*

Opinion of Circuit Court of Appeals, R. 44.

Indeed, if anything, the *Federal* case is an authority for the respondent's position. The corporate books were kept, and the corporate business was transacted, in Boston; and, if the petitioners' position were correct, it would necessarily have followed, in that case, that the mortgage there in issue was not valid, for failure to record in Boston.

If, then, the statutory "location of the principal office of a corporation" is its legal residence for the purpose of re-

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***The statement in the Petition, at page 9, that it does not appear in the *Federal* case where the mortgage was recorded is entirely erroneous. The record of the case is replete with such references.**

cording chattel mortgages, it must necessarily follow that the mortgage in the case at bar was not properly recorded.

The two phrases in the mortgage recording statute—"where the mortgagor resides" and "where the mortgagor then principally transacts his business"—are two entirely different legal concepts. To confuse them, to hold in effect (as the petitioners claim) that they mean the same thing, is to violate the familiar canon of statutory interpretation that

> "every word of a legislative enactment is to be given force and effect so far as reasonably practicable. No part is to be treated as immaterial or superfluous unless no other rational course is open."
>
> *Commissioner of Public Works* v. *Cities Service Oil Co.*, 308 Mass. 349, 360 (1941).

As the Circuit Court of Appeals points out (R. 43):

> "If 'residence' is read as synonymous with the de facto principal place of business then the recording statute contains a redundancy in requiring that the chattel mortgage be recorded both where the mortgagor resides and where the mortgagor 'then principally transacts his business'."

It is this distinction which makes *Emerson* v. *Proctor*, 97 Me. 460, cited on page 10 of the Petition, inapplicable.

Under the Massachusetts statute, and because of the use of both phrases, an even stronger case is made out for the respondent than in the *Fairbanks* case and those following it, where recording was required only in the place where the mortgagor "resides."

The decision of the Circuit Court of Appeals not only has the support of logic and of practical expediency—it is the

settled view of all of the decisions on the subject, most of which are cited in the opinion on pages 40 and 41 of the record.

See, especially:

Fairbanks Steam Shovel Co. v. *Wills,* 240 U.S. 642 (1916).

Sweeney v. *Keystone Driller Co.,* 122 Ohio St. 16 (1930).

Matter of A. & B. Oil Co., 95 F. (2d) 946 (1938).

First National Bank et al. v. *Wilcox,* 72 Wash. 473 (1913).

The outstanding text-book on the subject has stated the rule as follows:

> "The place of residence of a corporation for the purpose of recording a mortgage by it, is the place where it keeps its principal office. In this connection, *its principal office becomes identified and definitely fixed by the location stated in its certificate of incorporation,* and such becomes the proper locus for recording its chattel mortgages where the statute requires such recording in the county of the mortgagee's residence * * *." (Italics ours.)
>
> Jones, The Law of Chattel Mortgages and Conditional Sales (6th Ed. Rev.), sec. 253.

And, interestingly enough, even the tax cases, upon which the petitioners strongly rely—some of which are included among the cases cited on page 10 of the Petition—recognize the distinction between "residence" for tax purposes and "residence" for the purposes of recording.

> "The statement in its Articles of Association will undoubtedly estop the relator later to say that that is

> not its residence for certain purposes such as *filing chattel mortgages* and service of process; but where it is apparent that the sole purpose is to avoid taxes, and that no office for business * * * is kept at the place mentioned in its articles, the municipality where its real office is kept may assess and tax its personal property." (Italics ours.)
>
> *Detroit Transportation Co.* v. *Detroit,* 91 Mich. 382, 390 (1892).

The *Fairbanks* case is squarely in point, both upon its facts and upon the principle of law involved; and would seem to be decisive of all questions in this case. The attempts of the petitioners, both in the courts below and before this Court (Petition, pp. 12-13), to dismiss it upon the ground that, while it had a "superficial similarity" to the case at bar, it was distinguishable because of a statement in the opinion that "an office was nominally maintained in Chicago" are utterly ridiculous. Not only was there no basis in the record for the statement but, as the Circuit Court of Appeals points out (R. 42),

> "there is not the slightest indication why the [Supreme Court] made the statement that it did nor that it laid any emphasis at all on the maintenance of a nominal office. We do not think that the opinion lends itself to the interpretation that a different result would have been reached had the facts been stated exactly as in the court below."

In any case, there was as much of a "nominal office" in the case at bar as in the *Fairbanks* case (R. 7-8).

In no situation is certainty as important as it is in the law of recording; and the requirement of designating the loca-

tion of the principal office of a corporation is one of the most important steps in that direction.

Compare *Western Transportation Co.* v. *Scheu*, 19 N.Y. 408, 410 (1859).

As the Circuit Court of Appeals has stated it (R. 45):

> "Our decision has at least the advantage of providing one definite and certain place where a creditor can always look for the recording of a corporate chattel mortgage."

The instant decision presents no real hardship as compared with the insuperable difficulties with which a prospective mortgagee would be confronted if, out of the various cities or towns in which a corporation might be doing business and guided only by the helter-skelter of decisions relied upon by the petitioners, such a mortgagee were compelled—in addition to having to decide where the corporation principally transacted its business (compare *Matter of A. & B. Oil Co., supra,* at p. 947)—to choose, at his peril, a place of "residence" for recording purposes.

It is respectfully submitted that, "since the mortgage in this case was not recorded at the residence of the corporation as fixed by its principal office designated in its unamended articles of association, the mortgage is invalid as against the trustee in bankruptcy" (R. 45), the herein respondent.

II.

The Authorities Relied upon by the Petitioners do Not Apply and are Distinguishable.

Almost without an important exception, every case cited by the petitioners to this Court was cited in the brief and argument before the Circuit Court of Appeals; and its opinion deals with, and disposes of, those cases and the arguments based thereon in much greater detail than would ordinarily be expected, probably because this was a case of first instance under the Massachusetts statutes.

Roughly speaking, these cases may, in the main, be divided into four classes:

a. those which deal with questions of procedure, venue or jurisdiction, of which cases like *International Milling Co.* v. *Columbia Transportation Co.*, 292 U.S. 511 (1933), and *Ex Parte Schollenberger*, 96 U.S. 369 (1877), are examples;

b. those which deal with changes of residence by individuals, of which *Marlborough* v. *Lynn*, 275 Mass. 394 (1931), is an example;

c. those which deal with questions of residence as related to the anomalous Massachusetts "trespasser on the highway" doctrine, all of which turn upon a special statutory definition of "non resident," of which *Harnden* v. *Smith*, 305 Mass. 485 (1940), and other cases cited on page 5 of the Petition are examples; and

d. those which deal with questions of residence as the basis for imposing a tax and are either evidence of the eternal conflict between two or more taxing authorities or arise out of active attempts to evade the payment of a tax, of which *First Bank Stock Corp.* v. *Minnesota*, 301 U.S. 234 (1937), *Detroit Transportation Co.* v. *Detroit*, 91 Mich. 382 (1892), *Woodsum Steamboat*

Co. v. *Sunapee,* 74 N.H. 495 (1908), and, most of all, *Parker* v. *Proprietors of Cemetery of Mt. Auburn,* 217 Mass. 286 (1914), are examples.

In none of the earlier proceedings, whether before the Referee, the District Court, or the Circuit Court of Appeals, have the petitioners produced a single authority directly in point on the issue—nor have they done so in their Petition to this Court.

However freely it be admitted that the Rice Chocolate Company may have resided in Everett for any number of purposes (taxation, service of process, garnishment, etc.) at the time of the mortgage, it is a far cry to assume from this—and a definite *non sequitur* logically—that it also resided in Everett within the meaning of the applicable mortgage recording and business corporation statutes.

Conclusion.

The decision below is correct. In any case, there is no basis for a review under Rule 38(5). The petition should be denied.

Respectfully submitted,

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